

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OFFICE OF THE
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2008 AUG 26 PM 1:50
U.S. PATENT
AND
TRADEMARK OFFICE

JAMES E. ROSS and WILLIAM J. LYNCH,

Appellants

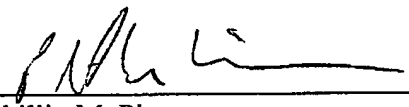
v.

NOTICE OF APPEAL

JON DUDAS, DIRECTOR,
UNITED STATES PATENT AND TRADEMARK
OFFICE,

Appellee

James E. Ross and William J. Lynch hereby appeal the court for review of the Decision on Request for Rehearing for **Appeal No. 2007-1587, U.S. Patent Application No. 09/901,512**, of the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office, which was decided and mailed on June 30, 2008. The decision was received on July 7, 2008. Please find enclosed a copy of the decision. Should you have any questions concerning this Notice, please feel free to contact the undersigned.


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CERTIFICATE OF SERVICE

On this 26th day of August, 2008, I caused the **original** foregoing Notice of Appeal and a copy of the Decision on Request for Rehearing (decided and mailed on June 30, 2008) to be delivered to the following:

by *Hand Delivery*:

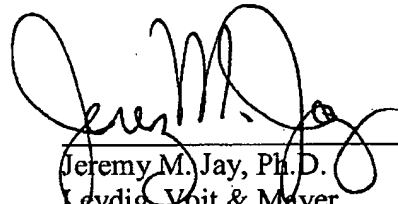
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Alexandria, VA 22314

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TRADEMARK OFFICE

On this 26th day of August, 2008, I caused: **three copies** of the foregoing Notice of Appeal, a single copy of the Decision on Request for Rehearing (decided and mailed on June 30, 2008), and the appropriate docketing fee to be delivered to the following::

by *Hand Delivery*:

Jan Horbaly
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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------------|------------------------|
| 09/901,512 | 07/09/2001 | James E. Ross | 212463 | 7508 |
| 23460 7590 06/30/2008 LEYDIG VOIT & MAYER, LTD TWO PRUDENTIAL PLAZA, SUITE 4900 180 NORTH STETSON AVENUE CHICAGO, IL 60601-6731 | | | EXAMINER NGUYEN, NGA B | |
| | | | ART UNIT 3692 | PAPER NUMBER |
| | | | MAIL DATE 06/30/2008 | DELIVERY MODE PAPER |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES E. ROSS and WILLIAM J. LYNCH

Appeal 2007-1587
Application 09/901,512
Technology Center 3600

Decided: June 30, 2008

Before HUBERT C. LORIN, ANTON W. FETTING and
JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants have filed a Request for Rehearing (Request) under 37 C.F.R. § 41.50(b)(2) (2007) and 37 C.F.R. § 41.52(a)(1) (2007) for reconsideration of our Decision of February 29, 2008. The Decision affirmed the Examiner's rejection of claims 7, 13, 37-40 under 35 U.S.C. § 102 (b) and claims 8-12, 14, 41-44 under 35 U.S.C. § 103(a).

ISSUES

Appellants allege three points of error in our Decision as follows:

- A. Whether the case law supports the Board's position that certain recited elements of Appellants' claims can be disregarding during determinations of patentability of the presently pending claims in view of the prior art;
- B. Whether Collen discloses a variety of grease board views; and
- C. Whether any of the alternative grease board views recited in claims 10-12 and 42-44 are patentable over the prior art.

RESPONSE TO ARGUMENTS

A. Appellants argue that "... the Decision erred in disregarding recited elements of Appellants' method and system claims by applying standards generally applied to data structures." (Request, pg. 5.) However the law applicable to treating nonfunctional descriptive material is not confined to data structures alone as Appellants allege, but rather to how claimed context relates to the substrate on which it is presented. Cases such as *In re Miller*, 418 F.2d 1392 (CCPA 1969) where the substrate was a spoon, and *In re Gulack*, 703 F.2d 1381 (Fed. Cir. 1983) where the substrate was an elastic band, show that the nonfunctional descriptive material test can be applied in the context of a variety of substrates, not simply in memory medium.

Appellants also argue that "the cases relied upon in the Decision are irrelevant in the context of statutory processes and systems. *In re Lowry*

pertains to the patentability of a data structure, not a statutory process.” (Request, pg. 5.) However, initially we note that this argument pertains to only claims 7-14 which are drawn to a method. The majority of claims on appeal namely, claims 37-46, are drawn to a system. Regarding claims 7-14 drawn to the method of accessing data, the arguments in favor of patentability would still hinge on the descriptive content the screen displays instead of the step that is performed. It is the step(s) and not content that must define invention over the prior art in a process claim.

Appellants further argue “...the Board's decision ...automatically disregard[s] nonfunctional recitations” (Request, pg. 4.) We disagree that our Decision automatically disregards any claim element. In fact, the Decision takes careful measures to insure that Appellants were given a detailed explanation (1.) identifying the nonfunctional descriptive material, and (2.) explaining why such has no relationship to the involved substrate. Specifically, the Decision explains:

We are unconvinced that the language of independent claims 7 and 37 requires a grease board view to have the specific content of “active patient records” data. This is because we find the “active patient records” data, (room location, patient's name, patient's physician, nursing orders, patient priority and elapsed time of stay, status of assignment of nurse and physician, and status of X-rays, labs, tests, nurses' orders, records, dictation and vital signs) to be nonfunctional and descriptive (FF 4). That is, the “active patient records” data is not functionally related to the computing process

in that the presentation of this information on the display or substrate occurs without regard to the content of this data. (FF 4)

(Decision pg. 12.) We thus find no basis for Appellant's assertion of an automatic handling of the nonfunctional descriptive material in the claims.

Finally, Appellants allege that the nonfunctional descriptive material which "... the Decision disregards (see Decision page 12) [is] ... in actuality definitional language used to define the nature of the 'active patient list grease board' views presented in accordance with the recited 'displaying' element in each of a set of dependent claims." This argument is circular in that it seeks to quantify the nonfunctional descriptive material as definitional to the grease board by attempting to limit the grease board by the content it displays, which cannot distinguish patentability.

B. Appellants next argue "Collen does not state that the general index displays a listing of patients. The Decision does not identify any disclosure within Collen supporting a conclusion that the general index control causes a listing of active patients in a grease board view." (Request, pg. 6.)

Appellants again seek to have the Board decide patentability based on the content of what is being displayed on given screen, and not on the architecture of the system involved. What matters is that the Decision does find that the system in Collen controls the selection of at least two different formats by actively selecting either LOCAL CENSUS or GENERAL INDEX screens in a manner similar to that of Appellants' Tracking Module 35 U.S.C. § 102 (b). (Decision (FF 7))

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C. Appellants finally argue "...Collen's general index is clearly not a grease board view since it does not display an active patient list." (Request, pg. 6.) Again, Appellants seek to define the invention by the content of a screen which we have concluded cannot be the subject of patentability when the content has no function except for what it expresses on the screen.

For the reasons above, we are not convinced that Appellants have shown with particularity points believed to have been misapprehended or overlooked by the Board in rendering its earlier decision. *See* 37 C.F.R. § 41.52(a)(1) (2007). Accordingly, Appellants' request for rehearing is denied.

CONCLUSIONS OF LAW

We conclude:

Our decision to affirm the decision of the Examiner to reject the claims on appeal under 35 U.S.C. § 103(a) over prior art has not been shown to have been erroneous.

This decision on rehearing is a FINAL agency action.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2007).

REHEARING DENIED

vsh

Appeal 2007-1587
Application 09/901,512

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES E. ROSS and WILLIAM J. LYNCH

Appeal 2007-1587
Application 09/901,512
Technology Center 3600

Decided: February 29, 2008

Before HUBERT C. LORIN, ANTON W. FETTING, and
JOSEPH A. FISCHETTI *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 7-14 and 15-36. Claims 1-6 and 15-36 have previously been cancelled.

We have jurisdiction under 35 U.S.C. § 6(b). (2002)

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This appeal arises from the Examiner's Final Rejection mailed February 28, 2005. The Appellants filed an Appeal Brief in support of the appeal on February 3, 2006. An Examiner's Answer to the Appeal Brief was mailed on March 24, 2006. A telephonic oral hearing was held on February 20, 2008

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants claim a computer system which relates generally to medical records which is said to provide access to documentation eliminating constant hunting for a patient's chart (Specification 2: 8,9) .

Claim 7, reproduced below, is representative of the subject matter on appeal.

7. A method of providing access to patient record documentation, patient tracking and order entry information in a system capable of rendering patient information in a variety of grease board views, comprising the steps of:

logging a user on to a peripheral terminal, and

displaying, at the peripheral terminal, a name of the user and an active patient list grease board, wherein the active patient list grease board is capable of displaying, from each one of a set of active patient records, a set of related information including:

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room location,
patient's name,
patient's physician,
nursing orders,
patient priority and elapsed time of stay,
status of assignment of nurse and physician, and
status of X-rays, labs, tests, nurses' orders, records,
dictation and vital signs,

wherein patient record information sets, from the active patient records, are presented on the peripheral terminal, during the displaying step, in accordance with a designated one of the variety of grease board views.

THE REFERENCES

The Examiner relies upon the following as evidence of unpatentability:

| | | |
|------------|--------------|---------------|
| Samar | US 5,778,072 | Jul. 07, 1998 |
| Engleson | US 5,781,442 | Jul. 14, 1998 |
| Ballantyne | US 5,867,821 | Feb. 02, 1999 |

Collen, "Hospital Computer Systems", published by John Willey and Sons, New York (1974).

THE REJECTIONS

The following rejections are before us for review.

1. Claims 7, 13, 37-40, 45 and 46 stand rejected under 35 U.S.C. §35 U.S.C. § 102 (b) as being anticipated by Collen.
2. Claims 8, 10-12 and 42-44 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Collen in view of "Official Notice."
3. Claims 9 and 41 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Collen in view of Engleson.
4. Claim 14 stands rejected under 35 U.S.C. §103 (a) as being unpatentable over Collen in view of Samar and Ballantyne.

ISSUE

The anticipation issue before us is whether Appellants have shown that the Examiner erred in rejecting claims 7, 13, 37-40, 45 and 46 under 35 U.S.C. § 102(b) as anticipated by Collen. This anticipation issue turns on whether the content of the active patient list requires the same content to be shown in the prior art.

The obviousness issues before us turn on whether Appellants have sustained their burden of showing that the Examiner erred in rejecting the claims on appeal as being unpatentable under 35 U.S.C. § 103(a) over 1) Collen in view of Official Notice; and 2) Collen in view of Engleson. More specifically, the first obviousness issue turns again on whether the content of a display can define invention where the context has no function

except to occupy memory and be displayed. The second obviousness issue is whether the combination of Collen and Engleson is improper because Engleson does not disclose patient record access.

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. We find that active patient list grease boards as used in the claims refers to different formats, e.g., department layout, waiting patients, patients who have complaints, etc. for the patient information enumerated, *see infra* (FF 2). (Specification 13:13-14:5)
2. The Specification refers to patient information, *infra* (FF 2), collectively as “active patient list” and only describes format changes being made to this data, e.g., department layout, waiting patients, patients who have complaints, etc. (Specification 13:13-14:5)
3. Change to format of Appellants’ active patient list information is controlled not by information in the patient list data, but rather by a user actively selecting a given display option in the Tracking Module 102. ((Specification 15:18-26), Figure 2, (Appeal Br.2))
4. We find that the patient list information (room location, patient's name, patient's physician, nursing orders, patient priority and elapsed time of stay, status of assignment of nurse and physician, and status of X-rays, labs, tests, nurses' orders, records, dictation and vital signs) is

descriptive in that it delineates who, what, when, where, and how, but the Specification makes no mention of this data controlling any system functional except for the expression found in the data when displayed.

5. The Examiner noted the following correspondence between elements of claim 7 and the prior art:

Collen discloses a method of providing access to patient record documentation, patient tracking and order entry information in a system capable of rendering patient information in a variety of grease board views (pages 121-123, Physicians, nurses can access to patient record documentation, patient tracking and order entry information in a *Nursing Station Subsystem*; page 122, paragraph 6, see "Selection of desired data", the nursing station subsystem displays the data in "*multiple listings and indices*" that is equivalent to "a variety of grease board views"). (Final p. 3) (Emphasis original.)

6. The Examiner further noted that Collen discloses

logging a user onto a peripheral terminal (page 125, paragraph 2, Dr. Smith inserts his identification card into the terminal identification card reader, the system logs the doctor), and displaying, at the peripheral terminal, a name of the user and active patient list "grease board" (figure 6-1b and page 125, paragraph 2, the system logs Dr. Smith on and displays his name, the date, the time of his interaction with the

terminal. (Final p. 3)

wherein patient record information sets, from the active patient record, are presented on the peripheral terminal, during the displaying step, in accordance with a designated one of the variety of grease board views (page 125 and figures 6-1 b through 6-1 v, the patient record is displayed on the Nursing Station Subsystem in multiple listings and indices). (Final p. 4)

7. Collen discloses “[i]n the event of error in selection of patient's name, the user may use one of the control functions to branch back to the local census or to a general index to all terminal locations in the hospital” (Collen, p. 125), indicating that a user in Collen controls the selection of at least two different formats by actively selecting either LOCAL CENSUS or GENERAL INDEX in a manner similar to that of Appellants Tracking Module 102.
8. We understand the practice of writing information on a grease board to be well known.

PRINCIPLES OF LAW

We begin with the language of the claims. The general rule is that terms in the claim are to be given their ordinary and accustomed meaning. *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed. Cir.

1999). In the United States Patent and Trademark Office (USPTO), claims are construed giving their broadest reasonable interpretation.

[T]he Board is required to use a different standard for construing claims than that used by district courts. We have held that it is error for the Board to “appl[y] the mode of claim interpretation that is used by courts in litigation, when interpreting the claims of issued patents in connection with determinations of infringement and validity.” *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320 (Fed. Cir. 1989); accord *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023 (Fed. Cir. 1997) (“It would be inconsistent with the role assigned to the PTO in issuing a patent to require it to interpret claims in the same manner as judges who, post-issuance, operate under the assumption the patent is valid.”). Instead, as we explained above, the PTO is obligated to give claims their broadest reasonable interpretation during examination.

In re Am. Acad. of Sci. Tech Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Limitations appearing in the specification but not recited in the claim are not read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003) (claims must be interpreted “in view of the specification” without importing limitations from the specification into the claims unnecessarily).

Although a patent applicant is entitled to be his or her own lexicographer of patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*, 347 F.2d 578, 580 (CCPA 1965). The applicant must do so by placing such definitions in the Specification with sufficient

clarity to provide a person of ordinary skill in the art with clear and precise notice of the meaning that is to be construed. *See also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (although an inventor is free to define the specific terms used to describe the invention, this must be done with reasonable clarity, deliberateness, and precision; where an inventor chooses to give terms uncommon meanings, the inventor must set out any uncommon definition in some manner within the patent disclosure so as to give one of ordinary skill in the art notice of the change).

Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). “When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art.” *Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001). “The identical invention must be shown in as complete detail as is contained in the . . . claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989). The elements must be arranged as required by the claim, but this is not an *ipsissimis verbis* test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990).

Obviousness

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14.

In *Graham*, the Court held that that the obviousness analysis is bottomed on several basic factual inquiries: “[(1)] the scope and content of the prior art are to be determined; [(2)] differences between the prior art and the claims at issue are to be ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” 383 U.S. at 17. *See also KSR Int’l v. Teleflex Inc., Id.* “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, at 1739.

Novelty/Obviousness Nonfunctional Descriptive Material

When “non-functional descriptive material” is recorded or stored in a memory or other medium (i.e., substrate) it is treated as analogous to printed matter cases where what is printed on a substrate bears no functional relationship to the substrate and is given no patentable weight. *See In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983)

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Nonfunctional descriptive material cannot render nonobvious an invention that would have otherwise been obvious. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). *Cf. In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability).

Patentable weight need not be given to descriptive material absent a new and unobvious functional relationship between the descriptive material and the substrate. *See In re Lowry*, 32 F.3d 1579, 1582-83 (Fed. Cir. 1994); *In re Ngai*, 367 F.3d 1336, 1338 (Fed. Cir. 2004). *See also Ex parte Mathias*, 84 USPQ2d 1276 (BPAI 2005) (nonprecedential) (Federal Circuit Appeal No. 2006-1103; affirmed without written opinion Aug. 17, 2006).

ANALYSIS

We sustain the rejections of independent claims 7 and 37, and separately argued claims 13, 45 and 46 which depend thereon, as being anticipated by Collen under 35 U.S.C. § 102 (b). We also affirm the rejections of dependent claims 37-40 since Appellants have not challenged such with any reasonable specificity (*See In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

Collen discloses 1) a method of providing access to patient record documentation, patient tracking and order entry information; 2) logging a

user onto a peripheral terminal; 3) displaying, at the peripheral terminal, a name of the user and an active patient list grease board. (FF 5, 6) These facts are not in dispute. (Appeal Br. 5) What Appellants do challenge is that although “Collen discloses an electronic grease board ... [it] supports only a single grease board view (FIG. 6-1b at page 124)” and not a “... variety of grease board views [which] provides alternate presentations of the listed information associated with a set of active patient records....” (Appeal Br. 5)

We are unconvinced that the language of independent claims 7 and 37 requires a grease board view to have the specific content of “active patient records” data. This is because we find the “active patient records” data, (room location, patient's name, patient's physician, nursing orders, patient priority and elapsed time of stay, status of assignment of nurse and physician, and status of X-rays, labs, tests, nurses' orders, records, dictation and vital signs) to be nonfunctional and descriptive (FF 4). That is, the “active patient records” data is not functionally related to the computing process in that the presentation of this information on the display or substrate occurs without regard to the content of this data. (FF 4) *See Lowry*, at 1582-83. This is evident in the Specification where the active patient list information is referred to and is treated as a block of data, without functionality, except for being changed in format as between, e.g., department layout, waiting patients, or patients who have complaints.

(FF 2, 3) But, the format change to the active patient records data only occurs by a user actively selecting a given display option in the Tracking Module 102 and not by any information in the data itself. (FF 3) Thus, Appellants cannot attempt to define “active patient list grease board” merely by the information content of a memory. *Id.*

That said, we do agree that claims 7 and 37 require a variety of grease board views or formats which the user designates for viewing “on the peripheral terminal, during the displaying step, in accordance with a designated one of the variety of grease board views.”

Collen however discloses a variety of formats in which data is presented and between which the user selects (FF 7), e.g., the user actively designates either LOCAL CENSUS or GENERAL INDEX formats or “grease board views”. (FF 7) Designation between formats in Collen occurs when the user actively selects a format in a manner similar to that of Appellants’ Tracking Module 102. (FF 7) The nature of the content in either of the LOCAL CENSUS or GENERAL INDEX formats is not at issue because as found *supra* (FF 4), Appellants’ active patient records data is nonfunctional descriptive material and cannot by itself distinguish invention from the prior art. *Id.*

Appellants argue that claim 13 distinguishes over Collen in that “...Collen discloses, at the top of page 125, presenting the non-grease board display depicted in FIG. 6-1a when a security card is inserted.” (Appeal Br.

6) However, the Appellants' arguments "fail from the outset because . . . they are not based on limitations appearing in the claims . . .," and are not commensurate with the broader scope of claim 1 which merely recites the security card logs on and "brings up" the grease board. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). Nothing in the claim requires the presentation of the grease board view immediately after logging in as argued by Appellants. Thus, in Collen, after the user selects LOCAL CENSUS, he/she "brings up" the active list grease board of Figure 6-1b.

Claim 14 which depends on claim 13 is indicated by Appellants to rise and fall with claim 13 and therefore we sustain the rejection thereof.
(Appeal Br. 9)

Appellants further argue the specific content of the grease boards in claims 45 and 46, but, as found *supra* (FF 4), this information is nonfunctional descriptive material which cannot define invention.

Rejections under 35 U.S.C. § 103(a)

We sustain the rejection of claims 8, 10-12 and 42-44 under 35 U.S.C. § 103(a) as being unpatentable over Collen. Although the Examiner used Collen in combination with Official Notice to reject these claims, we consider the use of Official Notice here to be cumulative, and therefore base our decision using only Collen.

Claim 8 recites "...an ordered status is shown in small letters and a

completed status is shown by large letters....” The rejection of claim 8 is challenged because “...there is no suggestion to use this technique to distinguish between ordered/completed statuses of tasks listed for a patient on a grease board view.” (Appeal Br. 6)

Appellants however admit “...that using smaller and larger letters is known.” *Id.* Thus, the determining factor between the claimed subject matter and the prior art is content, e.g., ordered versus completed information. We have concluded *supra* (FF 4), that the active patient records data is nonfunctional descriptive content which cannot distinguish invention, and thus we will not sustain the rejection of claim 8.

Similarly, claims 10/42 recite *inter alia*, display views comprising a list of patients waiting to be seen by a physician, in order of priority; claims 11/43 recite *inter alia*, display views comprising patient complaints; and claims 12/44 recite *inter alia*, display views comprising at least a list of patients whose reports have not been dictated by a physician. Again, Appellants erroneously seek to distinguish over the prior art merely by the information content of a memory. *See Lowry*, at 1582-83.

We further sustain the rejection of claims 9 and 41 under 35 U.S.C. § 103(a) as being unpatentable over Collen in view of Engleson.

Appellants arguments challenging the rejection of claims 9/41 under 35 U.S.C. § 103(a) over Collen in view of Engleson are not well taken because the Appellants are attacking the Engleson reference individually

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when the rejection is based on a combination of references. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754, 757-58 (CCPA 1968). Whether Engleson provides access to patient information or not, is not controlling because this feature is already taught by Collen (FF 5).

CONCLUSIONS OF LAW

We conclude claims 7-14, and 37-46 are sustained as to all rejections.

DECISION

The decision of the Examiner to reject claims 7-14, and 37-46 is sustained.

Since our application of the references differs from that of the Examiner, our affirmance is designated as new grounds of rejections under 37 CFR § 41.50(b) (2006).

37 CFR § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 CFR § 41.50 (b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejections to avoid termination of the appeal as to the rejected claims:

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(1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner

(2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record

Should the appellant elect to prosecute further before the examiner pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellant elect prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED: 37 C.F.R. § 41.50(b)

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vsh

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